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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 591

NEW ENGLAND MOTOR RATE BUREAU, INC., et al., and ACME FAST FREIGHT, INC., et al.,

Appellants,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

The National Small Shipments Traffic Conference, Inc.
Drug and Toilet Preparation Traffic Conference
Eastern Industrial Traffic League, Inc.

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, The National Small Shipments Traffic Conference, Inc., the Drug and Toilet Preparation Traffic Conference, and the Eastern Industrial Traffic League, Inc., intervenors in the district court proceeding below, move that the judgment of the district court be affirmed.

Statement

This is a direct appeal from a judgment (JS 1a) of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce Com-

mission entered in *Freight All Kinds, L.C.L., Container Charges—U.S.A.*, 323 I.C.C. 468 (1964). The Commission approved as just, reasonable and otherwise lawful tariffs of Railway Express Agency, Inc. (R E A), effective January 12, 1962, publishing charges for the transportation of all types of commodities, in straight or mixed shipments, maximum weight 3,000 pounds, when loaded by the shipper prior to tender into a container of 101 cubic foot capacity. A few commodities, of unusual character, are excluded from application of this particular rate schedule.

The three shipper leagues participated in the Commission proceeding and submitted evidence on behalf of a large cross-section of the shipping public. Shipper testimony before the Commission uniformly supported the R E A tariff on the ground that it represents a laudable approach to solution of what is termed in the transportation industry, "the small shipments problem". Shippers of less-truckload freight in small lots frequently find that their traffic is not favored by motor common carriers who have been markedly antipathetic to improvements in this realm —preferring, judging by the record, simply to increase the price of service by imposing surcharges and rate additives on small shipments, in lieu of seeking out technological offsets to higher costs. For this reason, shippers favored R E A's effort to apply, by this tariff, the results of technological improvement, and to reflect in this rate structure the reduced carrier expense of single container handling as opposed to multiple handling of loose packages.

Heretofore technological innovation in transportation has been directed to carload and truckload freight,

as in the various piggyback plans. R E A has by this tariff applied the containerization principle of piggyback to the small shipment sector. The shipping public desires the continuance of these rates because the tariff in issue is the *only* such tariff offered the small shipment public.

Argument

Shippers constituting the membership of the intervening leagues make extensive use both of motor carrier service and express service. Their interest is in a healthy motor carrier industry as well as a viable express system. To the shipper community, the issue raised by appellants has the aspect of one branch of the transportation system seeking to exclude another from small shipment transportation. Citing neither statute nor regulatory policy that would mandate such result, motor carrier appellants contend for total immunity from express competition in the small shipments market. They would relegate R E A exclusively to the carriage of those shipments which motor carriers do not care to handle. As noted in the Commission's report (JS 17a), express service was described at oral argument by counsel for motor carrier protestants as "a service that the motor carriers do not or are unwilling to or cannot feasibly render". From any viewpoint—regulatory, economic, or legal—such definition of express service is palpably unsound. The Commission so held, stating:

> "We are unable to reach [this] conclusion either as a matter of certificate interpretation or in compliance with our obligation to promote the objectives of the national transportation policy" (JS 26a).

Where, as here, an economic enclave is sought to insulate one sector of an industry from the competition of another, and neither policy nor statute so dictates, it is difficult indeed to see that a substantial question is raised.

The secondary thrust of appellant's argument is that the instant tariff does not fully comply with the *Arrowhead* criteria enunciated by the Commission, in that certain commodities are excluded from the tariff and that the tariff provides for a "lower grade of service at cheaper rates" (JS 4).

No shipper testifying before the Commission complained of the exclusion from the container tariff of: live creatures, articles requiring protection from heat or cold, human remains, or articles named in R E A's money classification. No evidence was presented by any party indicating that R E A does not in fact have tariffs filed under which it will carry such traffic. The motor carriers are in effect arguing that an express company may have only one rate structure which must in itself encompass all the different services provided. The fifth of the *Arrowhead* criteria rebuts this proposition. It provides that an express carrier must

> ". . . use relatively simple billing, rate *structures,* and rate *publications* whereby the rates and charges for the *services* offered and performed may easily be determined with a minimum of delay" (JS 21a). (emphasis added).

Reference to "rate structures", "rate publications" and "services" renders insubstantial the contention that an express company must publish rates appli-

cable to *all* the commodities which it carries under a single structure of charges; so long as it does in fact hold itself out to carry "any commodity which may be safely transported in ordinary van type equipment" it is immaterial whether it does so in one tariff or under one rate structure or by a number of them.

Nor is substantial question raised by the argument of appellants that R E A may not "maintain a lower grade of service at cheaper rates" Such contention implies that R E A must charge the same rate for a shipment which does not require, for example, armed guard accompaniment, or refrigeration in transit, as it does for a shipment not requiring such treatment. R E A has historically offered different grades of service dependent upon the transportation requirements of the traffic. Indeed, it would have priced itself out of business long ago had it not also charged differing rates for these grades of service. The third criterion of the *Arrowhead* case requires only that in rendering its various services R E A must

> * * * provide equally expeditious transportation and careful handling of all accepted shipments, regardless of their volume, special demands or value, from the point of pickup to the point of delivery.

The commission found that R E A's carriage of containerized traffic fully satisfied this requirement (JS 22a).

Conclusion

The Commission noted that the *Arrowhead* criteria "are practical and concrete requirements intended for the guidance of carriers engaged in express service to

assure that it remains bona fide". It interpreted REA's highway certificates as requiring adherence to such criteria, and found that the instant tariff was within the authority of an express carrier to publish. It thus once again affirmed the principle that an express company may maintain rates applying "to any character of traffic regardless of weight, size or description, subject to the ability of the express company to handle traffic in available equipment", which was enunciated in 1934 in *American Highway Freight Association* v. *Southeastern Express Company*, 201 I.C.C. 175, and in 1945 in *Express Rates From, To and Between Points in the South*, 262 I.C.C. 1.

It is respectfully submitted that none of the questions raised by appellants' Jurisdictional Statement is sufficiently substantial to warrant plenary consideration by this Court. The judgment of the district court should be affirmed.

Respectfully submitted,

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